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CIVIL AND POLITICAL RIGHTS, INCLUDING QUESTIONS OF DISAPPEARANCES AND SUMMARY EXECUTIONS

Question of enforced or involuntary disappearances

Note by the secretariat

Addendum

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* The original versions of all comments are available for consultation in the files of the secretariat.

Subsequent to the issuance of document E/CN.4/2001/69, replies have been received from the Governments of Canada, Panama, Paraguay and Switzerland and from the International Labour Office, which are reproduced in the present addendum.

I. COMMENTS AND INFORMATION PROVIDED BY STATES

A. Canada

[Original: English]

By note verbale dated 28 November 2000, the Permanent Mission of Canada to the United Nations Office at Geneva provided the secretariat with the following comments:

"Canada recognizes the necessity of providing effective protection to persons against enforced disappearance, to ascertain the fate of disappeared persons and to ensure that the perpetrators of enforced disappearances are punished, taking into consideration the gravity of their acts and omissions. For this reason, Canada has been and is a strong supporter of the work of the Working Group on Enforced or Involuntary Disappearances and supported the adoption of the Declaration on the Protection of All Persons from Enforced Disappearance (the Declaration) by the General Assembly in 1992. Nevertheless, we have some concerns regarding the proposal for a draft Convention.

"It is our view that the Declaration, other international instruments, including the International Covenant on Civil and Political Rights, the Convention against Torture, as well as the Rome Statute of the International Criminal Court (the Rome Statute), provide sufficient legal protection regarding enforced disappearance.

"The Rome Statute defines enforced disappearances and sets the conditions under which they may constitute crimes against humanity. The provisions of the Rome Statute will be completed by the Elements of Crime and the Rules of Procedure and Evidence of the International Criminal Court, which were approved in draft by consensus in June 2000 by the Preparatory Commission of the International Criminal Court. These instruments are the most recent iterations of the position of the international community and have widespread acceptance. The elaboration of a Convention could lead to the undermining of these standards.

"As regards the proposed Committee against Forced Disappearance, Canada is of the view that the creation of yet another treaty monitoring body would not be appropriate at this time. The proliferation of treaty monitoring bodies and of international instruments has translated into a proportional increase in reporting requirements and hence in States' reporting burdens. Many States already experience significant difficulties in complying with existing requirements and an additional treaty body would simply compound these difficulties. In addition, the Office of the High Commissioner for Human Rights has been faced with a situation of increasing numbers of ratifications, reports and communications while only receiving a very small increase in the financial resources available to it for that work.

"Solving cases of enforced disappearances by discovering the fate and whereabouts of disappeared persons and bringing perpetrators to justice are essential for restoring peace within societies arising from years of civil strife and conflict, allowing them to build a common future based on reconciliation, respect for the human rights of all persons, democracy and the rule of law. It is the view of the Government of Canada that concrete measures for combating enforced disappearances are provided for in existing international instruments. Canada would prefer to dedicate existing international and national efforts to achieving the full and effective implementation of existing international human rights treaties."

B. Panama

[Original: Spanish]

The Government of Panama provided the following comments:

"The draft convention provides for the punishment of perpetrators or participants in the offence of forced disappearance. When the disappearance offence was part of a systematic or massive practice, characterizing the commission of such acts as a 'crime against humanity'.

"We agree with the draft convention that prompt and adequate reparation for the damage caused should be extended to the victims or victim of a forced disappearance. We also agree with the imposition of an appropriate punishment commensurate with the extreme gravity of the offence, it being stipulated that the death penalty shall not be imposed under any circumstances.

"States should cooperate with and assist one another to the maximum extent possible in connection with any criminal investigation or proceedings relating to the offence of forced disappearance, including providing all the evidence at their disposal that is necessary for the proceedings.

"The wording used in the draft convention with regard to the duty to obey orders is also important, in that it very clearly establishes that any person receiving an order or instruction to carry out an offence of this kind shall have the right and duty not to obey it. In other words, the duty to obey does not justify blind obedience.

"Another important point is that the convention invites the States parties to protect all persons involved in the investigation, including the complainant, the relatives of the disappeared person and third parties involved in the criminal proceedings. Panamanian legislation on victim protection contains the same provision with regard to all offences. The authorities are placed under the same obligation under Panama's Narcotics Act and the Inter-American Convention against Corruption, which Panama has ratified. As a result, the protection of witnesses is a basic tool in the investigation and punishment of offences such as those covered by the draft convention.

"Panama concurs with the terms of article 12 of the draft convention, according to which forced disappearance shall not be considered a political offence for purposes of extradition. This clearly defines and limits the State's ability to use this as an argument to avoid the extradition of an accused person.

"The way in which the draft convention addresses the continuous and permanent nature of the offence is clearly of interest to Panama, that is as long as the fate or whereabouts of the disappeared person have not been determined with certainty, this will have repercussions for the statutory limitation on criminal proceedings and punishment. Article 17, in line with the provision that forced disappearance shall be considered a continuous and permanent offence, stipulates that no statutory limitation shall apply to criminal proceedings arising from a forced disappearance when the forced disappearance constitutes a crime against humanity.

"This could give rise to objections on the part of a specific section of the legal community in the Republic of Panama (counsellors and defence counsellors), but for the Government Procurator's Office it is consistent with the gravity of the offence and the possibility of future punishment, in a context of impunity.

"In the light of the above, we wish to add that a commission of public procurators of Panama that worked on a bill bringing local legislation into line with the Inter-American Convention against Corruption recommended that a list of equally grave offences also be exempt from statutory limitation. In other words, the proposal made by the draft convention on forced disappearances is in principle consistent with the position of the Government of Panama.

C. Paraguay

[Original: Spanish]

By letter dated 12 February 2001, the Permanent Representative of Paraguay to the United Nations Office at Geneva provided the secretariat with the following information:

"Paraguay has already ratified the Inter-American Convention on Forced Disappearance of Persons (Act No. 933/96). It is applied by Paraguayan judges and courts in their rulings, and the new Penal Code classifies enforced disappearance as an offence. This is no obstacle, however, to the Republic of Paraguay being party to another convention within the United Nations which punishes the same crime; on the contrary it strengthens its commitment to putting an end to impunity for crimes against human rights and reaffirms its intention not to let enforced disappearances go unpunished.

"To be a party to two systems with reference to norms concerning the same aspect of human rights has meant reinforcing protection rather than superimposing one system on the other, and has contributed to the domestic application of international human rights law. Paraguay is therefore party to instruments concerning the same human rights violation of combating torture, within the Organization of American States (OAS) and the United Nations, namely the regional and the universal conventions: the

OAS Inter-American Convention to Prevent and Punish Torture, Act No. 56/90, and the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Act. No. 69/90. The joint implementation of the two conventions in domestic law has contributed to improving the Penal Code and to establishing better domestic monitoring mechanisms. Where one of the conventions lacks a mechanism, it can be found in the other, and when one sets out a better definition, this is what is ultimately adopted in accordance with the pro homine principle of the interpretation most favourable to the individual.

"The OAS Inter-American Convention on Forced Disappearance of Persons, our regional instrument, does not establish a special body to ensure compliance with the Convention; instead, it gives the existing Inter-American Commission on Human Rights jurisdiction for this purpose and for the reception of individual communications. The United Nations draft convention on enforced disappearances does establish a specific mechanism, a committee of 10 experts to ensure compliance with the new convention, thus guaranteeing that the problem is handled at the specific level required. The existing Working Group on Enforced or Involuntary Disappearances, which is a non-treaty body, has no procedure for receiving individual complaints and there are various areas it is unable to cover because of the fact that it does not come within the framework of a specific convention.

"Paraguay considers it very important to adopt a universal instrument for the protection of all persons against enforced disappearances since, although the International Criminal Court punishes crimes against humanity, when they are not massive or systematic there is no legal instrument to cover enforced disappearances when no pattern of such violations exists. The adoption by the United Nations of a convention in this regard will help to ensure that these crimes do not go unpunished in the international community even when the context is not one of massive and systematic violations, and this convention will very usefully complement other existing mechanisms. Although in principle Paraguay supports the need for a specialized United Nations convention, it reserves the right to make such observations as it deems pertinent on the articles of the draft convention.

"The Declaration on the Protection of All Persons from Enforced Disappearance of 1992 is a General Assembly resolution which, although a useful instrument at the time, playing a necessary role in spelling out doctrinaire aspects of protection against this crime, did not have the necessary force to provide protection - the resolutions of the General Assembly come under the "soft law" doctrine which means that they are not binding - nor could it establish mechanisms to help to implement its provisions.

"To date, therefore, the United Nations has had no specific binding instrument for dealing with the problem of enforced disappearances, while the various forms in which this crime is perpetrated are not covered in other existing bodies of law. There is a lacuna, for example in the obligation of States to criminalize enforced disappearance and related offences; the obligation to try and extradite those responsible for enforced disappearances; the obligation to investigate; obligations regarding deprivation of liberty and remedies in the event of detention; and the obligation to criminalize the abduction of children.

"The draft convention provides for a mechanism adapted to the needs arising from the disappearance, periodic reports to be prepared for the more serious cases, monitoring machinery in the form of habeas corpus and even inter-State or individual inspections in situ. A mechanism is established for inter-State or individual complaints as in other conventions, with the same requirements regarding the exhaustion of domestic remedies and exceptions. This will apply to States parties, but in practice it will permit international human rights law to be applied more fairly in dealing with crimes of enforced disappearances.

"The report of the Working Group on the Administration of Justice prepared by Mr. Louis Joinet describes the background to the preparation of the draft convention, with all the comments which illustrate how its text was drafted. It should be added that Mr. Joinet is a jurist of known ability, who has practised for many years as a high-level magistrate in France, and in his work has contributed to the democratization of Paraguay. The Rapporteur of the Working Group is also a member of the Working Group on Arbitrary Detention and collaborates closely with Dr. Soledad Villagra, who is Paraguayan and is a member of the [latter] Working Group."

D. Switzerland

[Original: French]

By note verbale dated 13 November 2000, the Permanent Mission of Switzerland to the United Nations Office at Geneva provided the secretariat with the following comments:

"Switzerland was a firm backer, in 1992, of the adoption by the Commission on Human Rights of the Declaration on the Protection of All Persons from Enforced Disappearance, since the purpose of the Declaration was to secure from States political commitments allowing enforced disappearance to be combated nationally, regionally and internationally, and to provide the United Nations Working Group on Enforced or Involuntary Disappearances with the means of publicizing the Declaration and seeking compliance with it.

"The question now is whether, eight years after its adoption, the 1992 Declaration gives a strong enough political signal to the international community to put an end to enforced disappearances throughout the world. The answer is that it does not, since the United Nations General Assembly, in resolution 55/103 adopted at its fifty-fifth session (2000), states that it is '[d]eeply concerned, in particular, by the intensification of enforced disappearances in various regions of the world and by the growing number of reports concerning the harassment, ill-treatment and intimidation of witnesses of disappearances or relatives of persons who have disappeared' (fifth preambular paragraph), emphasizing "that impunity with regard to enforced disappearances contributes to the perpetuation of this phenomenon and constitutes one of the obstacles to the elucidation of its manifestations" (sixth preambular paragraph), and taking note 'of the transmission by the Subcommission on the Promotion and Protection of Human Rights to the Commission on Human Rights of a draft international convention on the protection of all persons from enforced or involuntary disappearance' (ninth preambular paragraph).

"Enforced disappearance is a serious violation of several human rights guaranteed by the 1966 International Covenant on Civil and Political Rights. Among the violations that an enforced disappearance may entail are those of the right to life (art. 6), the prohibition on torture and cruel, inhuman or degrading treatment or punishment (art. 7), the right to liberty and security of person (art. 9), the right of all persons deprived of their liberty to be treated with humanity and respect for the inherent dignity of the human person (art. 10), the right to a fair and public hearing by a competent, independent and impartial tribunal established by law (art. 14), the right of everyone to recognition everywhere as a person before the law (art. 16), and the right to the protection of the law without any discrimination (art. 26). Besides, enforced disappearance typically deprives its victims of the opportunity to exercise all their other rights.

"The added benefit that the draft international convention might provide vis-à-vis the International Covenant is that it tackles the problem of enforced disappearance from all angles and in its full scope. For instance:

- It provides a thorough and specific definition of forced disappearance (art. 1), which it makes a criminal offence (art. 2) that, if committed systematically or on a massive scale, constitutes a crime against humanity (art. 3). Note, however, that article 7 (paras. 1 (i) and 2 (a) and (i)) of the Rome Statute of the International Criminal Court gives a different definition of a crime against humanity. The draft convention should therefore either reproduce the wording of article 7 of the Rome Statute or contain a reference to it.
- It attempts to prevent, investigate and punish instances of forced disappearance, to establish international cooperation and to make reparation to the victims and their relatives and dependants a requirement (arts. 4-24).

"The International Covenant (arts. 6, 7, 9, 10, 14, 16 and 26) covers virtually all the rights violated by a forced disappearance. It would thus be appropriate to consider whether, instead of a completely new convention, a third optional protocol could be added to the Covenant to deal with forced disappearances. Such a protocol would contain substantive provisions inspired by the draft convention, namely a comprehensive, specific definition of forced disappearance, making it a criminal offence, and obligations to prevent, investigate and punish such disappearances, to cooperate internationally and to offer reparation.

"The advantage of this solution is that it avoids setting up a new, costly mechanism to monitor State parties' compliance with their obligations such as the draft convention calls for (arts. 25-33). States would be spared having to write an additional report since they would only need to add to their reports under the Covenant an extra chapter on the subject of enforced disappearances, which the Human Rights Committee (which could be increased in strength in proportion to its new tasks) could consider under the procedure laid down in the Covenant (art. 40). Provision could also be made for the Committee to consider communications from States (cf. article 29 of the draft) and individuals (art. 30)

on the subject of enforced disappearances, launch an inquiry in the event of systematic or massive occurrences (art. 28) and undertake a procedure to seek and find disappeared persons (art. 31).

"If at its 2001 session, next year, the Commission on Human Rights decides to set up an open-ended inter-sessional working group to consider the draft convention (cf. Commission resolution 2000/37, co-sponsored by Switzerland), Switzerland will take part. As it takes up the draft - the overall shape of the text and its compatibility with existing international human rights agreements will also need to be looked into - the working group could also discuss whether a third optional protocol to the International Covenant on Civil and Political Rights, dealing with the question of enforced disappearances, might be a workable alternative. In so doing the group could draw on the experience gained by the States members of the Organization of American States under the Inter-American Convention on Forced Disappearance of Persons."

II. COMMENTS AND INFORMATION PROVIDED BY INTERNATIONAL ORGANIZATIONS

International Labour Office

[Original: English]

By letter dated 30 January 2001, the Director-General of the International Labour Office stated the following:

"The International Labour Office has no comments on the draft international convention on the protection of all persons from enforced disappearance. We do, however, emphasize the ILO's concern with this issue because trade unionists are frequently victims of disappearances, which is regularly noted in the reports of the Governing Body Committee on Freedom of Association."